## Lim Lean Seng v Lim Ho Peng & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02–2774–11 OF 2011
RAMLY ALI, MOHTARUDIN BAKI AND DAVID WONG JJCA
20 JULY 2013

*Trusts and Trustees — Deed poll — Interpretation of — Distribution of trust property upon expiry of trust deed — Whether trial judge failed to determine class of persons entitled to trust property — Whether grantor's intention was clear — Whether trial judge erred in adopting list of 14 beneficiaries as approved by trustee*

By way of a deed poll dated 11 February 1896, one Ong Bee Neoh ('the grantor') had created a trust in favour of her two sons. The grantor's two sons were to hold a piece of land situated in Penang ('the trust property') on trust for themselves and their heirs during their lifetime and the lifetime of the grantor's grandchildren then living for a period of 21 years after the death of the last survivor of them. Upon the expiry of the 21 year period the trustees were to convey the trust property to all the next of kin of the grantor. When the 21 year period expired on 8 September 1997, the appointed trustee had compiled a list of 14 persons as beneficiaries to the grantor's trust. The trustee also placed two advertisements in two widely circulated national newspapers calling for claimants to the grantor's estate to come forward to claim their share to the trust property. The appellant applied to the High Court for an interpretation of the deed poll. In his application, the appellant also gave the court the option of determining whether the trust property ought to be distributed on a per capita basis or per stripes basis. The trial judge adopted the list of 14 beneficiaries as approved by the trustee and dismissed part of the appellant's application. Hence the present appeal. The appellant's main complaint in this appeal was that the trial judge had failed to determine the class of persons entitled to the trust property. In response, the respondents submitted that it was clear from the trust deed that it was the grantor's intention that the beneficiaries would be the next of kin living on 8 September 1997.

**Held**, dismissing the appeal with costs of RM20,000:

(1) The fact that the trial judge had not dwelled on the determination of class of persons in the manner advanced by the appellant, did not mean that there was no such determination. In the present case, there was no need to make any determination as to the manner of distribution of the trust property, as the grantor had made her intention known by using the phrase 'who shall be living' in the deed poll to describe the next of kin. Further the fact that the trust deed had not used the phrases 'per capita' or

'per stripes' showed that the beneficiaries should be the next of kin then living on 8 September 1997 (see paras 12–13).

(2) The trust deed had used the phrase 'tenants in common' without any specification as to the entitlement of each beneficiary. Thus, the amount of shares in the trust property should be equal (see para 14).

(3) The trial judge had considered the steps taken by the appointed trustees in conducting their search of beneficiaries before he adopted the list of beneficiaries created by them. Although the appellant's requirement of a formal kin inquiry was premised on his belief that there may be other beneficiaries in other parts of the world, it would not be in the interest of the estate to accede to the appellant's wish. The fact that there were two advertisements placed in two widely circulated national newspapers which attracted responses showed that what the trustees had done was adequate. In the circumstances, the trial judge had not erred in adopting the list of 14 beneficiaries as approved by the trustee. By adopting the list, the trial judge had by implication made a decision as to the class of beneficiaries entitled to the trust property (see paras 21–22).

**[Bahasa Malaysia summary**

Melalui surat ikatan pol bertarikh 11 Februari 1896, seorang yang bernama Ong Bee Neoh ('penjamin') telah menyempurnakan amanah memihak dua anak lelakinya. Kedua-dua anak lelaki penjamin akan memegang sebidang tanah yang terletak di Pulau Pinang ('hartanah amanah') atas amanah untuk mereka dan pewaris-pewaris mereka semasa hidup mereka dan masa hidup cucu-cucu penjamin yang masih hidup untuk tempoh 21 tahun selepas kematian pewaris terakhir. Selepas tamat tempoh 21 tahun pemegang-pemegang amanah hendaklah memberikan hartanah amanah tersebut kepada kesemua waris kadim penjamin. Apabila tempoh 21 tahun tersebut tamat pada 8 September 1997, pemegang amanah yang dilantik telah membuat senarai sebanyak 14 orang sebagai benefisiari kepada amanah penjamin. Pemegang amanah juga membuat dua iklan dalam dua suratkhabar nasional yang diedarkan secara meluas meminta penuntut-penuntut kepada estet penjamin untuk datang menuntut syer mereka terhadap hartanah amanah tersebut. Perayu memohon kepada Mahkamah Tinggi untuk tafsiran dalam surat ikatan pol. Dalam permohonannya, perayu juga memberi mahkamah opsyen untuk menentukan sama ada hartanah amanah patut diagihkan atas asas per kapita atau asas per stirpes. Hakim perbicaraan mengguna pakai senarai 14 benefisiari seperti yang diluluskan oleh pemegang amanah dan menolak bahagian permohonan perayu. Maka rayuan ini. Aduan utama perayu dalam rayuan ini adalah bahawa hakim perbicaraan gagal untuk menentukan kelas orang-orang yang berhak kepada hartanah amanah. Dalam menjawab, responden-responden berhujah bahawa adalah jelas daripada surat

ikatan amanah bahawa adalah niat penjamin bahawa benefisiari-benefisiari adalah waris kadim yang masih hidup pada 8 September 1997.

**Diputuskan**, menolak rayuan dengan kos RM20,000:

(1) Fakta bahawa hakim perbicaraan tidak memikirkan atas penentuan kelas orang dalam cara yang dimajukan oleh perayu, tidak bermaksud yang ianya tidak terdapat penentuan sedemikian. Dalam kes ini, tidak perlu membuat apa-apa penentuan kepada cara pengagihan hartanah amanah, kerana penjamin telah menunjukkan niatnya diketahui dengan menggunakan frasa 'who shall be living' dalam surat ikatan pol untuk menjelaskan waris kadim. Selanjutnya fakta bahawa surat ikatan amanah tidak menggunakan frasa-frasa 'per capita' atau 'per stripes' menunjukkan bahawa benefisiari-benefisiari sepatutnya adalah waris kadim yang masih hidup pada 8 September 1997 (lihat perenggan 12–13).

(2) Surat ikatan amanah telah menggunakan frasa 'tenants in common' tanpa apa-apa spesifikasi terhadap hak setiap benefisiari. Oleh itu, jumlah saham dalam hartanah amanah patut sama (lihat perenggan 14).

(3) Hakim perbicaraan telah mempertimbangkan langkah-langkah yang diambil oleh pemegang amanah yang dilantik dalam menjalankan pencarian mereka terhadap benefisiari-benefisiari sebelum dia menggunapakai senarai benefisiari yang dibuat oleh mereka. Walaupun keperluan perayu mengenai siasatan waris rasmi adalah berdasarkan atas kepercayaannya bahawa mungkin terdapat benefisiari-benefisiari yang lain di bahagian lain muka bumi ini, adalah bukan menjadi kepentingan estet untuk menyetujui kepada permintaan perayu. Fakta bahawa terdapat dua iklan diletakkan di dalam dua suratkhabar yang diedarkan secara meluas yang mendapat respons menunjukkan bahawa apa yang telah dilakukan oleh pemegang amanah adalah mencukupi. Dalam keadaan ini, hakim perbicaraan tidak tersilap dalam mengguna senarai 14 benefisiari seperti yang diluluskan oleh pemegang amanah. Dengan mengguna pakai senarai tersebut, hakim perbicaraan telah dengan implikasi membuat keputusan terhadap kelas benefisiari yang berhak kepada hartanah amanah tersebut (lihat perenggan 21–22).]

**Appeal from:** Originating Summons No 24–1400 of 2001 (High Court, Pulau Pinang)

*Saw Lip Khai (Chooi Saw & Lim) for the appellant.*
*Daphne Choy (Shahrizat Rashid & Lee) for the first to seventh respondents and tenth to 12th respondents.*
*Saw Lip Khai standing in for counsel (Kim Kean Siew & Co) for the 14th respondent.*
*Daphne Choy standing in for counsel (Choy & Associates) for the 15th respondent.*

**David Wong JCA:**

INTRODUCTION

**[1]** This is an appeal against the decision of the High Court, Penang in which the learned judge dismissed part of the originating summons of the appellant where he had sought the following reliefs:

(a) that the trust pursuant to the deed poll had expired on 8 September 1997;

(b) that based on the actual interpretation of the deed poll and the incidents occurred, it is to be determined whether the subject properties provided for the beneficiaries of Ong Bee Neoh, deceased in the said deed poll as of 8 September 1997:

(i) are the beneficiaries of Ong Bee Neoh, the deceased, on a per capita basis; or

(ii) are the beneficiaries of Ong Bee Neoh, the deceased, on a per stripes basis; or

(iii) ought to be managed in any other manner;

(c) a kin inquiry to find out who were individual persons falling under the class of beneficiaries of the trust as determined hereinbelow; and

(d) a vesting of the trust property in the beneficiaries of the trust upon determination and identification of the same by the court.

Prayers (c) and (d)were dismissed by the learned judge and this appeal relates to those dismissal.

**[2]** On 31 January 2013 we heard the appeal and after due consideration by us, we dismissed the appeal for reasons set out below.

BACKGROUND FACTS

**[3]** One Ong Bee Neoh ('Ong'), who is the widow of Lim It Kin, created a deed poll dated 11 February 1896 and in it Ong granted to her two sons, Lim Phee Cheak and Lim Leng Cheak a piece land measuring about 25 acres in the district of Teluk Ayer Rajah in Mount Erskine, Penang ('trust property').

**[4]** The deed poll provides that the two sons are to hold the trust property on trust for themselves and their heirs during their lifetime and the lifetime of Ong's grandchildren then living and for a period of 21 years after the death of the last survivor of them for use as a burial site for Ong and her husband Lim It Kin and their descendants generally.

**[5]** These grandchildren are Khoo Ghee Poh, Khoo Gaik Hok, Lim Chan Soo, Lim Guat Eong, Lim Sor Eong, Lim Quee Sean, Lim Yeow Hong, Lim Yeow Thoon, Lim Yeow Hooi, Lim Quee Heang, Lim Quee Guan, Lim Yeow Cheng, Lim Yeow Tong and Lim Chan Leong.

**[6]** The deed poll also provides that upon the expiry of the 21 years, the trustees are to convey the trust property to all the next of kin of Ong.

**[7]** It is undisputed that the 21 years period had expired on 8 September 1997 as the last survivor, Lim Eow Thoon, had died on 8 September 1976. As a result, the trust in the deed poll had lapsed and what is left to be done is the distribution of the trust property to the beneficiaries as provided in the deed poll.

GROUNDS OF APPEAL

**[8]** From the submission of learned counsel for the appellant, it can be said that the main complaint of the High Court's decision is that the learned judge had failed to follow the decision of Court of Appeal dated 6 April 2010 in failing to construe the deed poll and determine the class of persons entitled to the trust property.

OUR GROUNDS OF DECISION

**[9]** It is our considered view that this appeal concerns only the construction of the trust deed and for clarity we reproduce the relevant paragraph of the same:

> … To have and to hold the same unto the said Lim Phee Cheak and Lim LengCheak and their heirs in trust during the lifetime of my said sons and of my grandchildren now living namely … and for a period of twenty oneyears after the death of the last survivor of them to use and permit to be used the said lands as a burial ground for the said Lim It Kim deceased and for myself and for all and every of my abovenamed sons and grandchildren and of my family and descendants generally … *and from and after the expiration of the term of twenty one years aforesaid to absolutely convey the said lands to all my next of kin who shall then be living as tenants in common.*

**[10]** As conceded by respective counsel, the trust deed expired or dissolved on 8 September 1997 being 21 years after the death of last survivor that is Lim Eow Thoon on 8 September 1976. Hence what is left is for the courts to determine the rightful beneficiaries under the trust deed.

**[11]** The appellant has in his application in fact given a choice to the learned

judge in his prayers 2(a) and (b) with the former and latter requesting the trust property to be distributed on a per capita basis and per stirpes basis respectively.

**[12]** Both of these two modes provide for the manner of distributions in the event of any of beneficiaries pre deceasing the grantor. To explain the meaning of these archaic terms, it is best to do so by way of an illustration as follows. A leaves his house jointly to his son B and his daughter C. But B dies before A, leaving two young children. If A's will states that heirs of a deceased beneficiary are to receive the property per capita, C and the two grandchildren will each take a third. If, on the other hand, A's will states that heirs of a deceased beneficiary are to receive the property per stirpes, C will receive one-half of the property, and B's two children will share his half in equal shares (through A by right of representation).

**[13]** We agree with learned counsel for the respondent that there is no need to make any determination as to the manner of distribution as Ong, the grantor, had made her intention known by using the phrase 'who shall be living' to describe the 'next of kin'. In another words, the beneficiaries shall be the next of kin then living on 8 September 1997. Our view is fortified by the fact that the trust deed had not used the phrases 'per capita' or 'per stirpes'. The drafters of the trust deed must be presumed that they knew what they were doing and if they had wanted the trust property to be distributed as envisaged by the appellant, they could have easily used either of the terms in the trust deed. Their absence pointsto the conclusion advanced by the respondent.

**[14]** As for the amount of shares in the trust property, it is also our view that it is to be equal shares as the trust deed had used the phrase 'tenants in common' without any specification as to entitlement of each beneficiary.

**[15]** To recap, the main complaint of the appellant is the failure of the learned judge to determine the class of persons entitled to the trust property. With respect, the fact that the learned judge did not dwell with the determination of class of persons in the manner advanced by learned counsel for the appellant does not mean that there was no determination by the learned judge.

**[16]** From the grounds of judgment, the learned judge had looked into the manner and steps taken by the appointed trustees in conducting their search of beneficiaries before he adopted the list of beneficiaries created by them. By adopting that list, the learned judge had by implication made a decision as to the class of beneficiaries entitled to the trust property.

**[17]** The steps taken by the trustee were these. It is undisputed that two advertisements in *The Star* and *New Straits Time* were placed by the trustee calling for claimants to the estate.

**[18]** Prior to the placement of the two advertisements, the trustees had on 21 November 2003 trustee meeting approved and discussed the format of advertisement and approved by the signatories appearing at pp 158–159 of the record of appeal which reads as follows:

Notice:

The following persons were named as beneficiaries in the trust held under the Deed Poll dated 11 February 1896, granted by Ong Bee Neoh, deceased:

(1) Khoo Ghee Poh
(2) Khoo Gaik Hok
(3) Lim Chan Soo
(4) Lim Guat Eong
(5) Lim Sor Eong
(6) Lim Quee Sean
(7) Lim Yeow Hong/Lim Eow Hong
(8) Lim Yeow Thoon/Lim Eow Thoon
(9) Lim Yeow Hooi/Lim Eow Hooi
(10) Lim Quee Heang
(11) Lim Quee Guan
(12) Lim Yeow Cheng/Lim Eow Cheng
(13) Lim Yeow Tong/Lim Eow Tong
(14) Lim Chan Leong

Anyone who is a direct and immediate descendant of the abovenamed persons and living on 8 September 1997,please contact M/s Choy & Associates, 3rd Floor, Wisma Penang Garden, No 42 Jalan Sultan Ahmad Shah, Penang 10050 (Telephone: 042282550, Fax 042282551) by or before Friday 19 December 2003

For your approval:

… signed …

Madam Nelly Lim Goay Hooi

… signed …

Mr Lim Teow Wan

… signed …

Mr Lim Lean Seng (the Appellant in this appeal)

**[19]** There is no denial by the appellant that he signed the proposed notice.

Again in another trustee meeting dated 23 April 2004 (see pp 162–166 of the record of appeal), that list of beneficiaries had been confirmed by the trustees. In short the appellant was fully aware of the manner in which the 14 beneficiaries was approved and as pointed out by learned counsel for the respondents had raised no objection to the list. In fact a family tree had been prepared by the eighth respondent, Lim Keng Hor and the beneficiaries' list derives from that family tree.

**[20]** Learned counsel for the respondents thus argued that the appellant should not be allowed to recant to what he had agreed to. We agree with learned counsel as to allow such conduct would be unfair to his fellow trustees and not to mention the beneficiaries who until today after a span of some 16 years had not tasted or seen their benefits to the gift intended some 117 years ago.

**[21]** We further agree with the contention of learned counsel for the respondents that the appellant's requirement of a formal kin inquiry is premised on his belief that there may be other beneficiary in other parts of the world. It is our view that to accede to the appellant's wish would not be in the interest of the estate. It will also be an exercise which may not end. The fact that there were advertisements in two widely circulated national newspapers which in fact attracted responses show us what the trustees had done is adequate.

**[22]** For reasons stated above we are of the view that the learned judge had not erred in his decision in adopting the list of 14 beneficiaries as approved by the trustee.We further opine that the manner in which the learned judge dealt with the affidavit evidence was proper.

CONCLUSION

**[23]** For reasons stated above, we dismissed the appeal with costs of RM20,000 to all the respondents and ordered that the deposit to be refunded to the appellant.

*Appeal dismissed with costs of RM20,000.*

Reported by Kohila Nesan